THE FISCAL REGIME OF THE NON-RESIDENTS IN THE COMMUNITY LEGISLATION.THE PROBLEMS OF THE FISCAL CONVENTION OF THE O.C.D.E. MODEL REGARDING THE TAXES ON INCOME AND CAPITAL

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Double taxation is represented by submitting taxation to the same taxable subject, for the same period of time and from two different fiscal authorities, belonging either to the same state, or two different states. The negative effects of double taxation on trading goods and services, capital flows, technologies and persons are so well-known, that the importance of removing the obstacles that double taxation provides to the development of economic relations between countries is a very important issue.

When talking about avoidance methods, at the level of the member states of the European Union (E.U.), most of the fiscal treaties usually cover only the taxes on income and on capital. Because there is almost no community legislation in this field, member states are more or less free to establish norms of taxation which they consider adequate.

The Supreme Court of Justice has given its thoughts regarding this subject, claiming that member states, with the help of international agreements and through many other bilateral conventions which are mostly based on the model conventions on income and on taxation of fortunes issued by the European Organization for Economic Cooperation, should be competent enough to establish a taxation criteria on incomes and on fortunes in order to eliminate double taxation. In the absence of some unified and harmonized measures adopted in the EU Community, member states are free, within the bilateral agreements concluded for preventing the process of double taxation, to determine the linking factors that seek to devise the right of taxation. These linking factors with implications over a taxpayer differ from one taxation system to another.

The O.C.D.E. Committee for fiscal affairs has taken into consideration the possibility of adopting a multilateral convention that would replace the current bilateral fiscal treaties. However, the idea was abandoned for now, as putting it in practice would be a difficult process. Nevertheless, O.C.D.E. did not exclude the possibility of making a multilateral convention seem like an attractive technical solution for a group of states with similar objectives and fiscal systems. Talking at the level of the E.U., the bilateral treaties issued after the O.E.C.D. model are the ones that are currently prevailing.

The Member states of the Organization for Economic Development and Cooperation long time ago admitted the need of clarifying, standardizing and confirming the fiscal situation of the taxpayers that are employed in other countries in commerce, industry, finance or other fields, by applying common solutions for the identical double taxation cases. This is the main objective of the Fiscal Convention of O.C.D.E. regarding

taxes on income and capital; to offer a way of uniformly resolving the most common issues that appear in the field of the international juridical double taxations. According to the recommendation of the O.C.D.E., when the conventions or revisions of the current bilateral conventions end, member states have to comply with the Model Convention. The Model Convention is interpreted thru comments and also takes into consideration the doubts included in the Comments. Fiscal authorities within these states have to respect the periodically modified Comments and take into account the observations that are made along when applying and interpreting the foresight of the bilateral fiscal conventions that are based on the Model Convention.

The Model Convention does not exclusively refer to eliminating double taxation, but also approaches different themes like preventing tax evasion and non-discrimination. The Model Convention describes in the first place the field of application (Chapter I) and defines some of the most important terms (Chapter II). The main part is represented by Chapters III-V, which sets the rules by which each of the two Contractual States may tax the incomes and capitals in ways that the juridical international double taxation is eliminated. In what follows, there are the Special Dispositions (Chapter VI) and Final Dispositions (coming into force and resilience clauses, Chapter VII).

The Convention applies to all residents in either both or one of the Contractual States (Article 1). It refers to taxes on incomes and capitals, which are roughly described in Article 2.

Aiming to eliminate double taxation, the Convention established two sets of rules. First, articles 6 to 21 determine, with reference to the different classes of income, the afferent fiscal rights that belong to the State of residence or State of source. Article 22 contains similar foresights, which apply to capital only. In case of more income and capital elements, an exclusive right of taxation is given to one of the Contractual States. Usually, this exclusive right of taxation is given to the State of residence. In case of other income and capital elements, the taxation right is not exclusive. Regarding the two classes of income (dividends and interest), even though both states are given the right of taxation, the taxable sum in the State of source is limited.

Secondly, as long as these dispositions give the State of source a full or limited right of taxation, the State of residence has to allow the discharging of tax on income in order to avoid double taxation; hence the aim of Articles 23 A and 23 B. The Convention leaves the Contractual States the possibility of choosing between two methods of fiscal discharging, more specifically, the method of exemption and the method of credit.

Incomes and capital can be classified in three categories, depending on the applicable treatment to each of the categories in the State of source or situs: incomes and capitals that can be taxed without any limit in the State of source or situs; incomes that are subject to limited taxation in the State of source and incomes and capitals that cannot be taxed in the State of source or situs.

The following classes of incomes and capitals can be taxed limitless in the State of source or situs: incomes from real estates situated in the respective State (including incomes from agriculture and forestry), earnings from selling such properties and from the capital that they represent (Article 6 and paragraph 1 of Article 13 and 22); profits from a permanent office situated in the respective State, earnings from selling such a permanent office and the capital represented by a movable estate which is part of the patrimony of a permanent office (Article 7 and paragraph 2 of Article 13 and 22); incomes from activities practiced by artists and athletes in the respective State, even if the incomes go

to the artists and athletes themselves or to any other person (Article 17); the administrator fees paid by a resident company in the respective State (Article 16); the remuneration accorded to an employee from the private sector for the practiced activity in the respective State, only if the employee is not present in that State for a period that exceeds 183 days within any period of twelve months which opens or ends with the fiscal exercise taken into account and if certain terms apply; and the remuneration given to an employee for the activity held on board of a ship or airship that operates within the international traffic, or on the board of a ship, if the company's leadership is situated in the respective State (Article 15); under certain terms and conditions;remuneration and pensions that are paid for governmental services (Article 19).

The following classes of incomes can be subject to limited taxation in the State of source:

-dividends: conditioned that the stake with which the dividends are paid not to be effectively linked to a permanent office in the State of source. The State has to limit its taxation to 5 per cent of the gross sum of the dividends, in the case that the effective beneficiary is a company that owns at least 25 per cent of the dividends paying company and respectively 15 per cent of the gross sum of dividends in other cases (Article 10);

-interest: with the condition of respecting the same disposition as in the dividends case. The State of source has to limit its taxation at 10 per cent of the gross sum of the interest, except when the interest exceeds a normal sum (Article 11).

Any other income or capital elements that cannot be taxed in the State of source or situs are usually taxable only in the State of residence of the taxpayer. This foresight applies, for example, in the case of fees (Article 12), earnings from selling stocks or real estate titles (Article 13, par. 5), pensions from the private sector (Article 18), tuition fees (Article 20) and the capital that is represented by stocks or real estate titles (Article 22, par. 4).

Earnings that come from exploiting ships or airships in the international traffic or that come from ships that are hired in fluvial transport activities, earnings that come from selling these ships and airships and the capital that is represented by these is taxable only in the State where the company's leadership is situated (Article 8 and paragraph 3 of Articles 13 and 22). Commercial earnings that are non-assigned to a permanent office from the State of source are taxable only in the State of residence (Article 7, para.1).

When a resident from a Contractual State receives income from sources that are in the other Contractual State or owns capitals in it, which, according to the Convention is taxable only in the State of residence, there is no issue of double taxation because the State of source or situs is not allowed to tax the income or the respective capital.

On the other hand, when the income and capital is taxable with or without limits in the State of source, according to the Convention, the State of residence is obliged to remove double taxation through the method of exemption (taxable income or capital in the State of source or situs is avoided in the State of residence, but can be taken into consideration when determining the tax rate that is applicable for the rest of the income or capital of the respective contributor) or the credit method (taxable income or capital in the State of source or situs is subject to be taxable in the State of residence, but the taxation perceived in the State of source or situs is credited at the perceived taxes by the State of residence for that income or capital).

The Model Convention is trying to create a unique rule for every situation. However, in certain aspects it was necessary to apply a grain of flexibility in the Convention text, as it allows the

Model Convention to be put in practice effectively. Therefore, the member states have the advantage of benefiting from a certain flexibility; for example, concerning the stabilization of the tax rate at the source of dividends and rates, choosing the method of eliminating the double taxation and, by respecting certain conditions the allocation of profits to a permanent office by sharing the society's total profits. Moreover, in some cases, Comments contain alternative or supplementary dispositions.

For every Article of the Convention there is a detailed Comment that is meant to illustrate the foresights of the article in cause. Because Comments were elaborated and agreed by designated experts in the Committee for Fiscal Affairs by the Governments of the member states, they present an unusual importance for developing the international fiscal legislation. Although they are not conceived for being annexed one way or the other to the conventions that were signed by the member states, which, unlike the Model Convention are international juridical tools with mandatory character, Comments can still be extremely useful for applying and interpreting conventions and, especially for resolving disputes. Fiscal administrations from the state Members regularly consult the Comments in interpreting bilateral fiscal treaties.

Comments are useful both in taking decisions based on minor daily things as well as solving broad problems that have to do with politics and objectives that are at the root of different dispositions. Fiscal authorities offer great importance to the directions that are in the Comments.

Similarly, contributors have great base in Comments and in running their commercial activities and planning their transactions and business investments. Comments present a remarkable importance in the countries that have no procedures for obtaining a preliminary agreement for fiscal problems from the fiscal administration, and, Comments can be the only available source left to interpretation in cases like this.

Although all Member states agree with the objectives and the main providences of the Model Convention, almost all of them have doubts regarding some of the foresights, doubts that can be found in the Comments of the Articles taken into consideration.

The Northern Convention regarding Taxes on Income and Capital ended by Denmark, Finland, Iceland, Norway and Sweden in 1983 and replaced in 1987, 1989 and 1994 offers a practical example of a multilateral convention within a group of Member states and follows closely the foresights of the Model Convention. The Convention regarding Fiscal Mutual Administrative Assistance also is relevant; it was elaborated within the European Council based on the first project prepared by the Committee for Fiscal Affairs. This Convention first entered into force on the 1st of April 1995. Despite the fact that these two conventions have been concluded, there are no reasons for us to believe that the closure of a multilateral fiscal convention where all Member states would be included might be considered a practical solution. Therefore, the Committee considers that the bilateral conventions represent a way of ensuring the elimination of the double taxation at an international level.

The Committee for Fiscal Affairs analyses in what's coming both the abhorrent use of the fiscal conventions as well as international tax evasion. This problem is referred to in the Comments of more Articles, especially Article 26 which allows states to exchange information in order to combat abuses.

REFERENCES

*****	EC Law and Tax Treaties. Annex A - The Articles of the OECD Model Convention A Community perspective, July 5, Charlemagne Building, Room S2rue de la Loi / Wetstraat 170, Brussels, 2005
*****	EC Law and Tax Treaties. Annex B - The network of bilateral tax treaties, July 5, Charlemagne Building, Room S2rue de la Loi / Wetstraat 170, Brussels, 2005
*****	EC Law and Tax Treaties. Workshop of Experts - The Articles of the OECD Model Convention A Community perspective, July 5, Charlemagne Building, Room S2rue de la Loi / Wetstraat 170, Brussels, 2005
*****	The Model Convention with Respect to Taxes on Income and on Capital, O.E.C.D., 15 iulie 2005.

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